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BEHAVIORAL HEALTH and
UNITEDHEALTHCARE INSURANCE
COMPANY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

LD, DB, BW, RH and CJ, on behalf of themselves and all others similarly situated,

Plaintiffs,

V.

UNITED BEHAVIORAL HEALTH, a California Corporation, UNITEDHEALTHCARE INSURANCE COMPANY, a Connecticut Corporation, and MULTIPLAN, INC., a New York corporation.

Defendants.

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CASE NO. 4:20-cv-02254-YGR-JCS

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION TO EXCLUDE
THE EXPERT OPINIONS OF PROFESSOR
DANIEL KESSLER AND MS. JESSICA
SCHMOR**

Hearing: June 4, 2024 or TBD

Time: 2pm

Location: Oakland Courthouse, Courtroom 1,
4th Floor, 1301 Clay Street,
Oakland, CA 94612

Complaint filed: April 2, 2020
Third Amended Complaint filed: Sept. 10, 2021

1 Plaintiffs' motion to exclude portions of the expert reports of Jessica Schmor and Professor
 2 Daniel P. Kessler (Dkt. 428) ("Mot."), purportedly because they reflect legal opinions, is a frivolous,
 3 unnecessary motion intended to distract from these experts' opinions and the class certification issues
 4 before the Court. Ms. Schmor's report (Dkt. 412) draws on her expertise in the coding, billing, and
 5 reimbursement of healthcare claims to rebut the opinions of Plaintiffs' experts who testified on these
 6 same topics (Dkt. 397-5, 397-2). Professor Kessler's report (Dkt. 411) draws on his expertise in eco-
 7 nomics and healthcare policy to critique testimony regarding monetary harm contained in the reports
 8 of three of Plaintiffs' experts on these topics (Dkt. 397-2, 397-3, and 397-4). Both Ms. Schmor and
 9 Professor Kessler are well-qualified in these areas, and they explained in detail why each of their opin-
 10 ions is rooted in their expertise. Plaintiffs repeatedly attempted to draw these experts into discussions
 11 of legal issues at their depositions, but both experts refused to take the bait and instead pushed back by
 12 clarifying the scope and basis for their opinions.

13 Plaintiffs' attempt to compare Defendants' experts to Plaintiffs' previously-excluded legal ex-
 14 pert, Professor Alexandra Lahav, is frivolous. Professor Lahav conceded (in her report and at her
 15 deposition) that her opinions were based entirely on her analysis of *the law*. This Court therefore
 16 properly excluded Professor Lahav's declaration as invading the province of the Court, and as a "thinly
 17 disguised ... amicus brief." Dkt. 301 at 5. Plaintiffs' current motion appears to be merely tit-for-tat
 18 retaliation, because there is no legitimate comparison to be made between Defendants' experts (in
 19 medical coding, data analysis, and economics) and Professor Lahav (whose claimed expertise was in
 20 the law). Moreover, if Plaintiffs' arguments against Defendants' experts were valid, then their own
 21 remaining experts (Mark Hall, Robert Ohsfeldt, Lamon Willis, and RPC) would also need to be ex-
 22 cluded, because Defendants' experts are rebutting Plaintiffs' experts on the same issues and topics.
 23 Plaintiffs' motion should be denied.

24 ARGUMENT

25 I. Plaintiffs Misrepresent The Legal Standard For Excluding Legal Opinions

26 Plaintiffs misrepresent the standard for excluding an expert opinion as impermissible legal ar-
 27 gument, by suggesting that opinions that "cover issues related to 'class certification'" should be ex-
 28 cluded. Mot. at 3. That is not the law; indeed, "[r]eleven[ce]" to class certification, the question before

1 the Court, is a prerequisite for the admissibility of expert testimony. Fed. R. Evid. 402; *see Dkt. 301,*
 2 at 3 (stating that “opinion testimony by an expert” must be “relevant and reliable”); *Parrish v. Gordon*
 3 *Lane Healthcare, LLC*, 2023 WL 7107267, at *4 (C.D. Cal. Sept. 26, 2023) (Courts “use Daubert
 4 guidelines to determine whether expert testimony is reliable and relevant such that it can aid in forming
 5 a reasoned opinion on the class certification requirements.”). Plaintiffs’ own expert Dr. Ron Luke
 6 (from RPC) agreed at his deposition that his expert report was “related to class certification.” Dkt. 408-
 7 19 at 12:8-11, 14:22-15:2. And the very first paragraph of RPC’s expert reports says that RPC was
 8 asked to “address questions relevant to class certification.” Dkt. 397-2 at 1; Dkt. 427-3 at 1.

9 Instead, as this Court has explained, expert testimony is inadmissible when it consists entirely
 10 of “legal opinions” that “invade on the province of the Court.” Dkt. 301 at 4-5. “[A]n expert may offer
 11 [an] opinion as to facts that, if found, would support a conclusion that the legal standard at issue was
 12 [or was not] satisfied so long as the expert does not testify whether that legal standard has been satis-
 13 fied.” *Lauderdale v. NFP Ret., Inc.*, 2022 WL 17324416, at *3 (C.D. Cal. Nov. 17, 2022) (quotation
 14 marks omitted). As explained below, neither Ms. Schmor (a medical coding and billing expert) nor
 15 Professor Kessler (a PhD economist who has written extensively on healthcare economics and policy)
 16 come near this line.

17 II. Ms. Schmor’s Opinions On The Variation In Putative Class Members’ Healthcare 18 Claims Are Not Legal Conclusions

19 Plaintiffs cherrypick words like “claims” and “adjudication” to misleadingly suggest that Ms.
 20 Schmor (a certified medical coder and non-lawyer) offers legal opinions, without ever engaging the
 21 actual substance of her report. As her analysis makes clear, Ms. Schmor draws on her expertise in
 22 coding, billing, and reimbursements to explain the “variations” in the putative class members’
 23 “healthcare claims,” and how those claims are processed (or “adjudicated”) in the insurance context.
 24 Dkt. 412 ¶¶ 7, 36-37 (emphasis added).¹ In the paragraphs that Plaintiffs seek to strike, she explains
 25 the pricing of intensive outpatient (“IOP”) services—the services that Plaintiffs claim Defendants im-
 26 properly priced—and identifies variability in plan documents, IOP provider coding and billing prac-
 27 tices, and claim adjudication processes underlying putative class members’ insurance claims. *See id.*

28 ¹ Plaintiffs’ experts use “claims” and “adjudicate” in the same sense. *E.g.*, Dkt. 427-3 ¶ 44.

¶¶ 1a, 7, 35-37, 44, 46, 48, 57. These core factual issues bear directly on whether Plaintiffs' allegations can be addressed on a classwide basis. The report also explains why evaluating one of Plaintiffs' main arguments—that Viant did not account for additional compensation to the professionals who rendered the IOP services—requires individualized review of class members' medical records. *Id.* ¶¶ 51-52; *see also* Dkt. 414-1 at 7. Ms. Schmor offers no opinion as to whether Rule 23 has or has not been satisfied—only “opinion[s] as to facts.”² *Lauderdale*, 2022 WL 17324416, at *3. By contrast, Plaintiffs’ experts have repeatedly and expressly given legal opinions on class certification. *See, e.g.*, Dkt. 397-3 at 5-6 (opining that “class actions are especially appropriate regarding ERISA-governed health plans”); Dkt. 427-3 ¶ 112 (concluding that “sub-classes are readily identifiable if they are necessary”); *id.* ¶ 137 (arguing that there is “no practical problem with certifying the disputed claims as a class or as sub-classes”).³

That Ms. Schmor’s opinions necessarily employ terminology relevant to the Rule 23 inquiry does not transform them into impermissible legal argument. It is well established that an expert “may properly be called upon to aid the jury [and *a fortiori*, the Court] in understanding the facts in evidence even though reference to those facts is couched in legal terms.” *United States v. Andujo*, 2021 WL 5860900, at *1 (9th Cir. Dec. 10, 2021) (quoting *Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004)). Indeed, the Ninth Circuit has recognized that “it is sometimes impossible for an expert to render his or her opinion on a subject without resorting to language that recurs in the applicable legal standard.” *United States v. Diaz*, 876 F.3d 1194, 1198 (9th Cir. 2017); *see also, e.g.*, *Box Elder Kids, LLC v. Anadarko E & P Onshore, LLC*, 2022 WL 13682599, at *4 (D.

² At her deposition, Ms. Schmor repeatedly declined to offer legal opinions in response to questions from Plaintiffs. *See* Dkt. 427-6 at 38:10-15 (“[M]y area of expertise is coding, billing and reimbursement … I’m not a lawyer so I don’t have any expertise in legal issues related to class certification.”); *id.* at 46:20-22 (“I’m not going to be able to give you an opinion on whether something is legally acceptable.”); *id.* at 50:20-23 (“I’m not offering any legal opinions on whether or not the variability meets the criteria for class certification. That’s for the court to determine.”); *id.* at 65:21-66:1 (“I don’t have any opinions—legal opinions with respect to what is and is not appropriate for a definition of a class. I’m simply providing context for the variability as the … class definition is currently defined.”).

³ Defendants have not filed motions to strike these parts of Plaintiffs’ expert reports because this Court can simply refuse to rely on them in deciding class certification, and thus it would unnecessarily burden the Court and potentially run afoul of the spirit of Paragraph 11 of this Court’s standing order limiting *Daubert* motions. Defendants reserve all rights to attack Plaintiffs’ experts as appropriate in class certification briefs and, if necessary, at any later phase of the case.

1 Colo. Oct. 21, 2022) (admitting expert opinion that “use[d] the terms ‘common’ and ‘typical’ in their
 2 ordinary sense rather than as terms of art in the context of Rule 23 jurisprudence”). It is entirely ap-
 3 propriate for Ms. Schmor to reference the class definition, because it defines the scope of the healthcare
 4 claims at issue. To the extent Ms. Schmor’s report discusses other concepts relevant to the Rule 23
 5 inquiry, such as “variability,” the Court “can readily distinguish between words used as legal terms of
 6 art and words used for their ordinary meaning.” *Box Elder Kids*, 2022 WL 13682599, at *4.

7 **III. Professor Kessler’s Opinions On Injury And Variation In Plan Language Are Not Legal 8 Conclusions**

9 Professor Kessler’s opinion draws on his expertise in economics, health policy, the design of
 10 health insurance benefits and reimbursement systems, and the analysis of medical claims data to ex-
 11 plain (1) the inconsistencies in Plaintiffs’ allegations of economic injury, and (2) the variation in the
 12 language describing reimbursement obligations in the relevant health plans.

13 1. Plaintiffs object to portions of Professor Kessler’s report that explain the economic incon-
 14 sistencies embedded in Plaintiffs’ damages model (¶¶ 11, 35, 42, 46, 53); analyze the evidence of bal-
 15 ance bill payments requested or received by subpoenaed providers (¶ 50); and conclude that “to deter-
 16 mine whether and how much monetary loss Class members incurred requires establishing Class mem-
 17 bers’ responsibility for, and actual payments of, balance bills” (¶ 55). Plaintiffs do not and cannot
 18 explain their assertion that these paragraphs “indulg[e] in legal analysis.” Mot. at 4. Professor Kess-
 19 ler’s opinions regarding the viability of establishing *economic* harm to putative class members are well
 20 within his expertise in healthcare economics.⁴ Plaintiffs’ bare allegation to the contrary appears de-
 21 signed to obscure a lack of any substantive response to Professor Kessler’s straightforward conclusion
 22 that patients who did not pay balance bills have suffered no economic harm.

23 As Plaintiffs are doubtless aware, expert opinion on economic injury is extraordinarily com-
 24 mon. See, e.g., *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651,
 25 676 (9th Cir. 2022) (affirming district court’s “rigorous analysis of the expert evidence presented” to

26 4 Plaintiffs’ citation to *Gable v. National Broadcasting Co.*, which excluded portions of an expert
 27 opinion that “instruct[ed] the Court as to Ninth Circuit law” and “read much like a third legal brief,” is
 28 wholly inapposite. 727 F. Supp. 2d 815, 835 (C.D. Cal. 2010), aff’d, 438 F. App’x 587 (9th Cir. 2011). Professor Kessler does not discuss legal authorities or opine on them in his report, and also refused to do so when invited by Plaintiffs at his deposition. See *infra* n.6.

1 establish or contest economic injury); *Silva v. B&G Foods, Inc.*, 2022 WL 4596615, at *3 (N.D. Cal.
 2 Aug. 26, 2022) (concluding that plaintiffs had not “presented any evidence to rebut Defendants’ expert
 3 report showing that the vast majority of class members more likely than not suffered no economic
 4 harm”). Indeed, Plaintiffs have no qualms about introducing their own expert opinions on the topic.
 5 Although RPC strategically ducked certain simple questions about economic injury, Dkt. 416-14 at
 6 198:3-24 (Dr. Piper refusing to answer whether he had “any evidence” whether “plaintiffs lost money
 7 as a result of” fees paid by plan sponsors), RPC reversed course when they believed it advanced Plain-
 8 tiffs’ case. For example, RPC made conclusory statements about the alleged “harm done to class mem-
 9 bers,” Dkt. 427-3 at 61, and have testified that balance billing is a “vector of economic harm.” Dkt.
 10 416-14 at 182:21-22; *see also* Dkt. 416-54 at 50:22-51:5.⁵ Plaintiffs should not be heard to complain
 11 about an expert economist’s responses to these very arguments.

12 2. Plaintiffs also object to Paragraph 40 of Professor Kessler’s report, in which he identifies
 13 economically relevant variations in plan language related to payment obligations. Expert opinion re-
 14 garding the interpretation of specialized contract terms is likewise common. Courts in this circuit have
 15 long recognized that “in cases where the contractual language contains terms with specialized or tech-
 16 nical meaning in a given industry,” as the plan terms at issue here do, “a qualified expert may assist the
 17 trier of fact by offering insight on the meaning of the language in the context of that industry.” *Pac.*
 18 *Fuel Co., LLC v. Shell Oil Co.*, 2008 WL 11336467, at *5 (C.D. Cal. Jan. 24, 2008). In a putative class
 19 action, “expert testimony on whether interpretation of [the] types of contract provisions [at issue] could
 20 vary” is particularly “useful in deciding whether [a] proposed class meets Rule 23 requirements.”
 21 *Ulibarri v. Southland Royalty Co., LLC*, 2019 WL 1226962, at *6 n.4 (D.N.M. Mar. 15, 2019); *see,*
 22 *e.g.*, *Santomenno v. Transamerica Life Ins. Co.*, 2016 WL 6469858, at *8 (C.D. Cal. May 13, 2016)
 23 (crediting expert’s evidence of “huge variations in annual plan/participant-level fees across plans” such
 24 that reasonability analysis “would require individualized inquiries”); *Moore v. Apple Inc.*, 309 F.R.D.
 25 532, 545 (N.D. Cal. 2015) (concluding based on “conce[ssions]” in plaintiffs’ expert’s declaration that
 26 “variations in the wireless service agreements” at issue would require “evaluat[ion of] each individual’s

27 ⁵ RPC’s Dr. Luke also opined on the economic implications of balance billing in the *RJ v. Cigna*
 28 litigation. *See RJ v. Cigna Behavioral Health, Inc.*, No. 5:20-cv-02255 (N.D. Cal. Jan. 2, 2024), ECF
 No. 226-11 at 200.

wireless service agreement.”). Professor Kessler’s plan language analysis does precisely this, by identifying plan language that may impose varying reimbursement requirements. Plaintiffs’ bald assertion (at 5) that Professor Kessler “draws legal conclusions from that analysis” is wholly unsupported.

Equally meritless is Plaintiffs’ attempt to fault Professor Kessler for acknowledging during his deposition that it was “hard for [him] to separate out” his “legal training in preparing [his] report.” Mot. at 5; Dkt. 427-5 at 34:8-10. The context of that statement speaks for itself:

Q: [D]oes this report contain any legal opinions?

A: No.

Q: Did you apply your legal training in preparing this report?

A: Well, it’s hard for me to separate out, you know, school I went to 25 years ago. I’m only offering economic opinions in this matter. … I’m not here to offer any opinions on whether Plaintiffs have satisfied the legal requirements for class certification.

Dkt. 427-5 at 34:5-13, 36:24-37:1. Plaintiffs’ own expert Dr. Luke gave a near-identical answer when asked about his own legal training in a similar case. *See RJ v. Cigna Behavioral Health, Inc.*, No. 5:20-cv-02255 (N.D. Cal. Jan. 2, 2024), Dkt. 215-10 at 20:4-6 (“I’m familiar with legal concepts, but I’m not here to offer you legal opinions.”). Moreover, the substance of Professor Kessler’s report and testimony show that he was relying on his expertise in healthcare economics and policy—rooted in his PhD and years of training and study of these topics—not any legal analysis. When Plaintiffs tried to drag Professor Kessler into a legal debate at his deposition, he repeatedly declined.⁶

Plaintiffs’ critique (in their reply in support of class certification) that Professor Kessler’s plan language analysis required no more than “basic reading comprehension” also contradicts their allegation that it constitutes impermissible legal opinion. Dkt. 426 at 19 n.19; Mot. at 5. And Plaintiffs’ own expert submissions belie the notion that plan language needs no explanation. Their expert Mark Hall devotes large portions of his report to explaining the meaning of “UCR,” complete with citations to legal authority. *See* Dkt. 397-3 at 5-6 (citing Ninth Circuit caselaw and a law review article to interpret

⁶ *See, e.g.*, Dkt. 427-5 at 36:11-13 (“[The requirements for class certification] sounds like a legal question to me, which I would not be able to provide an expert opinion on here.”); *id.* at 36:24-37:1 (“I’m not here to offer any opinions on whether Plaintiffs have satisfied the legal requirements for class certification.”); *id.* at 38:12-13 (“I’m not here to offer any legal opinions about the reach … of ERISA.”); *id.* at 56:2-4 (“I wouldn’t purport to advise the court on [the propriety of class certification]. That’s a legal question.”); *id.* at 77:18-20 (“[I]f this is a legal question, I don’t have an opinion about that.”); *id.* at 79:21-23 (“I certainly wouldn’t presume to provide, you know, a legal opinion about this.”); *id.* at 185:21-186:5 (explaining that “assessing whether something is consistent with the terms of a class member’s plans” is “a matter of logic, not a law”).

1 “variation in the wording of the plan documents”). At the hearing on Plaintiffs’ original class certifi-
 2 cation motion, Plaintiffs’ counsel argued that Professor Hall had established that the relevant plan lan-
 3 guage on payment obligations “is all substantially similar.” Jan. 27, 2023 Hrg Tr. at 51:17-23. Like-
 4 wise, Plaintiffs’ expert Dr. Piper testified as to his “interpretation” of the term “competitive fees” as a
 5 plan term. Dkt. 416-14 at 142:4-146:12. Plaintiffs therefore have no basis to exclude Professor Kess-
 6 ler’s application of his “expert[ise] in understanding how health plans work” to assist the Court in
 7 determining, as a factual matter, the existence of variation in “how [the] plans [at issue here] are spec-
 8 ifying their payment obligation.” Dkt. 427-5 at 120:7-122:8.

9 **IV. Defendants’ Expert Reports Are Wholly Unlike Professor Lahav’s “Amicus Brief”**

10 Finally, there is no basis whatsoever for Plaintiffs’ comparisons to the previously excluded
 11 expert declaration of Professor Alexandra D. Lahav (Dkt. 170-26). Lahav, a law professor, stated
 12 during her deposition that her declaration sought to answer the question, “Does the law support certi-
 13 fying a class under these circumstances, with this class definition?” Dkt. 214-2 at 130:3-5. Her dec-
 14 laration consisted entirely of legal argument, concluding based on Professor Lahav’s interpretation of
 15 the applicable law that Plaintiffs’ proposed classes “should be certified … because [certification] is
 16 consistent with [Rule] 23 and governing precedent.” Dkt. 170-26 ¶¶ 2, 24. The Court recognized that
 17 such statements “are unambiguously legal opinions [that] are outside of the province of expert testi-
 18 mony” and rightly “reject[ed] plaintiffs’ thinly disguised attempt to submit what is essentially an amici-
 19 cus brief as an expert report.” Dkt. 301 at 5.

20 By contrast, each of Defendants’ expert reports discusses “technical facts” relevant to class
 21 certification and “does not focus exclusively [or even substantially] on [R]ule 23’s legal standards.”
 22 *Abraham v. WPX Prod. Prods., LLC*, 184 F. Supp. 3d 1150, 1205-06 (D.N.M. 2016). Ms. Schmor and
 23 Professor Kessler have expressly disclaimed any attempt to make legal conclusions, and have instead
 24 offered opinions based on “specialized knowledge” of non-legal fields that will “help the [Court] to
 25 understand the evidence” weighing against class certification. Fed. R. Evid. 702. Unlike Professor
 26 Lahav’s report, those opinions do not “attempt to instruct the [Court] on the law, or how to apply the
 27 law to the facts of the case,” and thus are not “impermissible legal conclusion[s].” *Diaz*, 876 F.3d at
 28 1199.

CONCLUSION

Defendants respectfully request that the Court deny Plaintiffs' Motion to Exclude the Expert Opinions of Professor Daniel Kessler and Ms. Jessica Schmor.

DATED: May 16, 2024

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1 **ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1**

2 Pursuant to Civil Local Rule 5-1(i)(3) of the Northern District of California, I attest that con-
3 currence in the filing of the document has been obtained from each of the other signatories to this
4 document.

5 DATED: May 16, 2024

6 GIBSON, DUNN & CRUTCHER LLP

7 By: /s/ Geoffrey Sigler
8 Geoffrey Sigler